National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*

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On May 11, 1973, Judge William Matthew Byrne, Jr., dismissed all charges against the defendants Daniel Ellsberg and Anthony Russo in the celebrated Pentagon Papers trial.[1] The court granted the defendants' motion to dismiss based "upon the totality of government misconduct, including the suppression of evidence, the invasion of the physician-patient relationship, the illegal wiretapping, the destruction of relevant documents and disobedience to judicial orders."[2]

Welcome as the dismissal was to the defendants, their counsel, and others who participated in the defense, there was a bittersweet quality to it. One of the defendants characterized it as "a great partial victory."[3] This ambivalence was caused by Judge Byrne's refusal to rule on the defendants' motion for judgment of acquittal,[4] a ruling which would have reached the merits of the Government's case. Such a ruling had not been sought solely to exonerate the defendants; the broader objective was to clarify the scope of the Government's right to suppress dissemination of documents in which the Government claims a national security interest. As a participant in this effort by the defense,[5] I was reflecting on these feelings of ambivalence and frustration as I left the federal courthouse in Los Angeles immediately after Judge Byrne's ruling. At that moment a man exiting at the same time remarked to me: "The criminal goes free because the

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1. United States v. Russo, No. 9373-(WMB)-CD (filed Dec. 29, 1971), *dismissed* (C.D. Cal. May 11, 1973). This was the second case involving the Pentagon Papers. The first was New York Times Co. v. United States, 403 U.S. 713 (1971). *See* text accompanying note 10 *infra*.

2. This was the basis of the defendants' motion to dismiss, stated orally by Leonard Boudin, chief counsel for the defendants. Judge Byrne adopted this statement in an oral response as the grounds for dismissal.

3. L.A. Times, May 12, 1973, § I, at 18, col. 2.

4. As a preliminary to granting the motion to dismiss, Judge Byrne did state that, based upon a reading of the written arguments in the motion for judgment of acquittal, he would have denied the motion as to some counts of the charge. He did not specify which counts he had in mind.

5. This writer appeared as attorney for the American Civil Liberties Union, as amicus curiae. Briefs were filed first in support of the defendants' motion to dismiss (Brief for ACLU as Amicus Curiae in Support of Defendants' Motion to Dismiss; Supplementary Brief for ACLU of Southern California as Amicus Curiae), and later in support of the defendants' motion for judgment of acquittal (Brief for ACLU as Amicus Curiae in Support of Defendants' Motion for Judgment of Acquittal). Most of the ideas contained in this Article germinated in those briefs.

policeman erred."[6] This, no doubt, reflects an opinion shared even by many members of the bar. Since the major facts were largely undisputed, it is probably widely assumed that the defendants were guilty of stealing government documents and that they went free only because of the "technicality" of the Government's misconduct in connection with the case.[7]

The purpose of this Article is to explore the statutory and constitutional status of penalties for the disclosure of official secrets—the issues that were raised but left unanswered in the Ellsberg case. Was Ellsberg a criminal who escaped punishment due to the Government's improper tactics? Although the trial is over, the answer to that question remains of considerably more than academic interest. The specter of Ellsberg hangs over government officials, newsmen, and others who may in the future wish to disclose to the public vital governmental documents. The "chilling effect," to which the Supreme Court has often referred in other speech contexts,[8] is obvious. What follows is an attempt to reduce that chill by showing that the statutes Ellsberg was charged with violating either cannot be interpreted to make criminal his conduct or, if so interpreted, are unconstitutional.

I. The Facts

The basic facts of the Ellsberg case were so highly publicized that no more than the barest factual outline need be repeated here.[9] In mid-1967, then Secretary of Defense Robert S. McNamara commissioned the writing of a history of the United States role in Indochina. The individuals who contributed to the writing of this study, which has come to be known as the Pentagon Papers, were military officers, civilians who worked in the Pentagon, and civilians from outside institutions, including various universities and the Rand Corporation. Daniel Ellsberg was among those contributing to the study. The resulting documents were all classified as top secret.

It was undisputed at the trial that between August 1969 and May 1970 Ellsberg was in possession of a copy of the Pentagon Papers. The Government's witnesses acknowledged that Ellsberg was authorized during such period to have possession of the Papers, provided he kept them at all times on the premises of the Rand Corporation in Santa Monica, California, and when not in use, in his top secret safe, and provided further that he did not

6. This anonymous commentator must have been a lawyer since his observation was a direct paraphrase of Judge Cardozo's pithy remark, "The criminal is to go free because the constable has blundered," in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

7. Even so careful a reporter as Theodore H. White has casually referred to Ellsberg as "the thief of the Pentagon Papers." T. White, The Making of the President 1972, at 288 (1973).

8. *E.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52–53 (1971); Dombrowski v. Pfister, 380 U.S. 479, 487 (1965).

9. For more detail, *see* Newsweek, June 26, 1972, at 29; Time, June 28, 1971, at 11.

reproduce them. Ellsberg admitted that he temporarily removed the Papers to a location on Melrose Avenue in Hollywood, some 10 miles from Rand, and that he there caused the Papers to be copied. Anthony Russo admitted that he aided in the copying process. It was undisputed that by May 1970 all of the Papers in Ellsberg's possession had been returned by him to Rand.

Although the eventual disposition of the Pentagon Papers was not germane to the charges against Ellsberg and Russo, a statement of the basic facts would be incomplete without mentioning that the *New York Times* and the *Washington Post* ultimately came into possession of the Pentagon Papers and published them in June 1971. The Government's effort to enjoin such publication proved unsuccessful in the United States Supreme Court in *New York Times Co. v. United States*.[10] However, that decision, which dealt with newspaper censorship, did not answer the questions posed in the criminal action against Ellsberg and Russo.

II. The Nature of the Charges

Several possible misconceptions about the charges against Ellsberg and Russo should be dispelled. Neither of the defendants was charged with disclosing or delivering the Pentagon Papers to the *New York Times* or to the *Washington Post*. Furthermore, none of the 15 counts of the indictment alleged an improper disposition of "classified" documents. In fact, the indictment says nothing about the top secret classification of the Pentagon Papers. The explanation for this seemingly glaring lapse is that federal statutes only restrict the use of "classified" documents or information in limited contexts that have no application to the Pentagon Papers case. Thus, 18 U.S.C. § 798[11] only deals with cryptographic and communications intelligence,[12] while 50 U.S.C. § 783(b)[13] prohibits the unauthorized communication of classified information to agents of foreign governments or members of communist organizations.[14] In short, contrary to what may well be a popular misconception, the United States does not have an "Official Secrets Act" making it generally unlawful to disclose classified information.[15]

The two statutory provisions upon which the Government primarily

10. 403 U.S. 713 (1971).

11. 18 U.S.C. § 798 (1970).

12. "The term 'communications intelligence' means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients . . . ." *Id.* § 798(b).

13. 50 U.S.C. § 783(b) (1970).

14. *See also* 42 U.S.C. §§ 2271–77 (1970) concerning data relating to the manufacture and utilization of atomic weapons and the production and use of fissionable material.

15. Something a good deal closer to an Official Secrets Act is contained in the Nixon Administration's proposed Criminal Code Reform Act of 1973, S. 1400, 93d Cong., 1st Sess. §§ 1122–26 (1973).

relied in the indictment of Ellsberg and Russo were 18 U.S.C. § 641[16] and 18 U.S.C. §§ 793(d)–(e).[17] There were other peripheral charges involving other statutory provisions, but the efficacy of these counts was largely dependent upon the validation of the section 641 and subsections 793(d) and (e) counts.[18] Violation of section 641 was charged in six different counts. Central to the section 641 counts, however, was count two. If that one fell, the others would no longer be viable.

We first proceed, then, to a discussion of the allegation of violation of section 641 under count two, and then to an analysis of the constitutionality of subsections 793(d) and (e). Finally, we will consider the underlying

16. "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater." 18 U.S.C. § 641 (1970).

17. "(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

"(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; . . .

". . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." *Id.* §§ 793(d)–(e).

18. Count one, based upon *id.* § 371, generally alleged a conspiracy to commit all of the offenses specifically charged in the later counts. In addition, it alleged a conspiracy "to defraud the United States and an agency thereof by impairing, obstructing, and defeating its lawful governmental function of controlling the dissemination of classified Government studies, reports, memoranda and communications." This portion of count one raises numerous problems apart from considerations of first amendment protection and is beyond the scope of this Article. *See* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959). Whether the classification system constitutes a "lawful governmental function" does raise first amendment issues touched upon in notes 78–108 *infra* and accompanying text. Counts 8, 9, and 10 all alleged violation of 18 U.S.C. § 793(c) (1970), which prohibits the receiving or obtaining of documents, etc., "connected with the national defense." Such receiving or obtaining under § 793(c) is unlawful only if the actor knows or has reason to believe that the items will be obtained or disposed of "contrary to the provisions of this chapter." Pursuant to such statutory requirement, counts 8 through 10 each allege knowledge or reason to know that the documents in issue "would be disposed of," Indictment at 14, 15, or "would be obtained and disposed of," *id.* at 17, contrary to the provisions of 18 U.S.C. §§ 793(d)–(e), *id.* at 14, 15, 17. Therefore, the § 793(c) counts all rest on the validity of the §§ 793(d) and (e) counts. *See* note 77 *infra*.

first amendment implications of the Government's asserted interest in national security secrecy in the Pentagon Papers case.

III. Section 641: Stealing, Conversion, and Embezzlement of Things of Value Belonging to the United States

Count two of the indictment charged Ellsberg with violation of section 641 in that he did "embezzle, steal and knowingly convert to his own use and the use of another" the documents which have come to be known as the Pentagon Papers.[19] Thus, three separate crimes were charged in count two: stealing, conversion, and embezzlement. For the reasons indicated below, it seems clear that Ellsberg could not properly have been found guilty of any of these three alleged crimes.

A. *Stealing*

The leading case construing section 641 is *Morissette v. United States.*[20] In that case, the Supreme Court emphasized that "[t]o steal means to *take away from one* in lawful possession without right with the *intention to keep* wrongfully."[21] The Court contrasted stealing with the crime of conversion, which requires no "intent to keep."[22] In this, the Court simply confirmed what is universally recognized: that a necessary element of stealing is an intent *permanently* to deprive.[23] At the trial the Government failed to prove

19. Indictment at 6.

20. 342 U.S. 246 (1952).

21. *Id.* at 271, *quoting* Irving Trust Co. v. Leff, 253 N.Y. 359, 364, 171 N.E. 569, 571 (1930). While hunting on a government bombing range, Morissette, without any attempt at concealment, carried away and thereafter sold three tons of used bomb casings that had been dumped there in heaps and apparently abandoned. The Court reversed his conviction under § 641 because the trial court failed to require proof of criminal intent to steal or knowingly convert.

22. *Id.* at 271–72.

23. The necessity for this element in the crime of stealing was recognized most recently by the Supreme Court of California in a case bearing a striking resemblance to the Ellsberg case. In that case, People v. Kunkin, 9 Cal. 3d 245, 507 P.2d 1392, 107 Cal. Rptr. 184 (1973), the defendants were the owner and editor of the "underground" newspaper known as the *Los Angeles Free Press* and a reporter. A mail clerk employed in the office of the Attorney General of California removed from that office a copy of a personnel roster which listed the names, addresses, and telephone numbers of undercover narcotics agents throughout the state. He furnished the roster to the *Free Press*, which proceeded to publish it under the headlines: "Narcotics Agents Listed," "There should be no secret police," and "Know your local Narc." The defendants were convicted of receiving stolen property by taking possession of the documents containing the narcotics agents' names.

The court assumed, without deciding, that "one of the several copies of the roster" of names was "property" within the meaning of the statute prohibiting the receiving of stolen property. *Id.* at 249, 507 P.2d at 1395, 107 Cal. Rptr. at 187. (This issue in itself presents very delicate first amendment issues. *Compare* the vacated opinion of the court of appeal affirming the conviction, 100 Cal. Rptr. 845 (2d Dist. 1972), *with* the Brief for Reporters Committee for Freedom of the Press as Amicus Curiae, People v. Kunkin, *supra.* The Reporters Committee made the argument that documents prepared by public officials may not, by reason of the first amendment, be classified as "property" under state law for purposes of theft statutes unless the documents, as distinguished from the information contained thereon, have intrinsic value in excess of their value as paper or contain information which is of commercial value.) The court first considered whether the "property" had been stolen, noting that "[i]t has been settled for at least 78 years that theft by larceny requires a specific intent permanently to deprive the rightful owner of his property." 9 Cal. 3d at 251, 507 P.2d at 1396, 107 Cal. Rptr. at 188. In determining whether the evidence supported the verdict, the court

—indeed, did not even seek to prove—that Ellsberg had an intent to "keep" the documents referred to in count two. On the contrary, the evidence was undisputed that Ellsberg intended only a temporary disposition of the documents, and that he had returned them all long prior to the indictment. Thus the element of intent to keep was lacking.

Moreover, under the *Morissette* standard quoted above, in order to "steal" it is required not only that the defendant have an intent to keep but also that he "take away from one in lawful possession." It was clear from the Government's own witnesses that Ellsberg was authorized to have possession of the documents referred to in count two.[24] For example, one government witness testified that Ellsberg had a top secret safe and that keeping the documents in the safe would constitute proper storage.[25] Thus, under the *Morissette* standard, Ellsberg did not "take [the documents] away from one in lawful possession," since he himself was in lawful possession.

Therefore, on the grounds that there was neither an intent permanently to deprive nor a wrongful taking of possession, the Government failed to prove "stealing" of the documents. Nor could the Government claim that there was a "stealing" of the information contained in the documents.[26]

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stated: "There is scant evidence . . . that [the mail clerk] intended a permanent deprivation." *Id.* at 251, 507 P.2d at 1397, 107 Cal. Rptr. at 189. The court finally concluded: "A final item of evidence convinces us, however, that there was sufficient circumstantial evidence for the finder of fact to reasonably draw the inference that [the mail clerk] took the roster with intent to steal. This dispositive circumstance is that [he] had in fact ceased working for the office of the Attorney General at the time of his tender of the roster to defendants. Thus he was no longer in a position conveniently to return the roster to the office following its perusal by defendants." *Id.* at 252–53, 507 P.2d at 1397, 107 Cal. Rptr. at 189. This is to be contrasted with the Pentagon Papers case where Ellsberg was in a position to return the Papers, and in fact did so. The California supreme court nevertheless reversed the conviction against the receiving defendants on the ground that the evidence was insufficient to establish that they knew the roster was stolen when tendered to them. In other words, they did not reasonably know that the mail clerk intended a permanent deprivation of the documents, since the mail clerk had repeatedly requested that the defendants return the documents to him after their contents had been published by the *Free Press*.

24. The Government claimed that Ellsberg failed to register his copies of the Pentagon Papers (possession of which he had properly been given in Washington) with the Rand Santa Monica Top Secret Control Officer "so that they could be entered into the RAND records of control." Record at 8,325, United States v. Russo, No. 9373-(WMB)-CD (filed Dec. 29, 1971), *dismissed* (C.D. Cal. May 11, 1973). The defense disputed that Ellsberg had any such obligation, but in any event, the Government did not dispute Ellsberg's right of possession provided the documents had been registered and kept in Ellsberg's safe when not in use. *See* text accompanying note 25 *infra*.

25. *Id.* at 12,354, 12,856.

26. In United States v. Friedman, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), the defendants were convicted, *inter alia*, of receiving and concealing stolen government property in violation of § 641. The trial judge instructed the jury "that the information contained in Grand Jury transcripts, i.e., the information as to the questions asked and answers given at a particular session or sessions of the Grand Jury, are the property of the United States and remain its property alone unless and until the release of said information is ordered by a court order. Said information is Government property regardless of who may be said to own the particular sheets of paper or tapes on which said information is recorded." *Id.* at 1087. One defendant challenged this instruction for failure to instruct further that the jury must find that the defendant "knew that the transcripts had not been released by court order and were therefore government property." *Id.* In approving the jury instructions and affirming the conviction, the court of appeals noted that the defendant "does not argue that, as a matter of law, the information contained in the transcript was not government property." *Id.* Thus, the first amendment limitations referred to in the text were neither raised nor decided in *Friedman*.

United States v. Bottone, 365 F.2d 389 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966), affirmed

Apart from the fact that Ellsberg was in lawful possession of such information, and that the Government was not permanently deprived of it,[27] a serious abridgment of first amendment rights would result if, in this context, information contained in governmental documents could be "stolen." These first amendment implications are discussed below.[28]

B. *Conversion*

At the trial, a government witness testified to the effect that Ellsberg did not have authority to remove the Pentagon Papers from the Rand facilities or to copy or reproduce them.[29] The evidence was clear that in fact Ellsberg did remove the Papers from Rand to a location some 10 miles away, on Melrose Avenue in Hollywood, and that he there reproduced or caused the Papers to be reproduced. The Government's case for conversion was thus based upon the acts of removal and reproduction. However, as a matter of law neither of these acts can constitute "conversion" within the meaning of section 641.

1. *Temporary removal of the papers.*

Disregarding for the moment the reproduction of the Pentagon Papers, their temporary removal from the Rand facility did not constitute an act of criminal conversion. Suppose, for example, that Ellsberg had, without authority, taken the documents to his home in order to do his Rand work at home (which may well be a common practice among those authorized to work on classified documents). Would this deviation in itself subject him to liability for conversion? Not only the commonsense answer, but the answer on legal authority, is in the negative: it would not be a conversion.[30]

There is a dearth of authority on what constitutes *criminal* conversion

a conviction for violation of 18 U.S.C. § 2314 (1970) (transporting in interstate commerce "any goods, wares, merchandise, securities or money of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud"). The court of appeals found a "serious question" as to whether the papers transported were "goods" which had been "stolen, converted or taken by fraud" since the original documents had been returned, and only defendants' photocopies moved in interstate commerce. 365 F.2d at 393. The court expressed the view that "when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial." *Id.* at 393–94. As in *Friedman*, first amendment limitations were not decided (nor apparently raised) in *Bottone*. Moreover, the quoted language is not an unambiguous holding in view of the court's additional statement: "Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen 'goods' on any view." *Id.* at 394.

27. The Government argued that it was permanently deprived of exclusive possession of the information. Record at 13,784. It is, of course, no more than a metaphor to speak of "possession," exclusive or otherwise, of an intangible. It is even more of a strain on language to regard "exclusivity" as a quality capable of possession. *Cf.* R. MILGRIM, TRADE SECRETS § 1.02[1], at 1–13 (1967): "[T]rade secrets, intangible forms of property, are not susceptible of being reduced to possession."

28. *See* notes 50–53 *infra* and accompanying text.

29. Record at 12,160, 12,693.

30. Of course, such behavior might give rise to other forms of liability, including discharge from employment. *See* note 99 *infra*.

under section 641. However, in *Morissette v. United States*,[31] the Supreme Court made it clear that the scope of the crime of conversion under section 641 may be no greater than that of the tort of conversion.[32] If, then, Ellsberg's conduct would not have constituted a tortious conversion, a fortiori it could not have been a criminal conversion.

We must thus inquire whether one who is authorized to possess certain documents at a given place commits a tortious conversion of such documents by temporarily removing them to another location, some 10 miles distant, and thereafter returning them to their original location. The modern view clearly establishes that such conduct in itself is not a conversion. An illustration to this effect is given in the *Restatement (Second) of Torts*: "*A* entrusts an automobile to *B*, a dealer, for sale. On one occasion *B* drives the car, on his own business, for ten miles. This is not a conversion."[33]

The principle of the *Restatement* has been explicitly applied to facts very similar to those in the Pentagon Papers case. In *Pearson v. Dodd*,[34] the Court of Appeals for the D.C. Circuit stated:

> It is clear that on the agreed facts appellants committed no conversion of the physical documents taken from appellee's files. Those documents were removed from the files at night, photocopied, and returned to the files undamaged before office operations resumed in the morning. Insofar as the documents' value to appellee resided in their usefulness as records of the business of his office, appellee was clearly not substantially deprived of his use of them.

Judge J. Skelly Wright's opinion for the court of appeals in *Pearson* explains the *Restatement* principle as follows: "[I]t has long been recognized

31. 342 U.S. 246 (1952); *see* notes 20–22 *supra* and accompanying text.

32. With regard to whether intent was required to commit a knowing conversion under § 641, the *Morissette* Court stated that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Id.* at 263. The antecedents of § 641 were explained by Chappell v. United States, 270 F.2d 274, 277–78 (9th Cir. 1959): "As Congress must have known, the words 'converts' and 'conversion' really have their origin in the law of torts. . . .

". . . We construe [§ 641,] a section defining a crime. As such it must be strictly construed. It cannot be enlarged by analogy or expanded beyond the plain meaning of the words used." Although there is language in the *Morissette* opinion that might seem to support a contrary result, *see* 342 U.S. at 266 n.28, 271, the weight of the argument clearly is on the side of the position taken in the text.

33. RESTATEMENT (SECOND) OF TORTS § 222A, Illustration 21 (1965); *see id.*, Illustration 25: "*A* rents an automobile to *B* to drive to *X* City and return. In violation of the agreement, *B* drives to *Y* City, ten miles beyond *X* City. No harm is done to the car. This is not a conversion." Although the *Restatement* principle has been described as the "modern view," there is considerable supporting authority in the older cases. *See, e.g.*, Daugherty v. Reveal, 54 Ind. App. 71, 102 N.E. 381 (1913); Doolittle v. Shaw, 92 Iowa 348, 60 N.W. 621 (1894); Spooner v. Manchester, 133 Mass. 270 (1882). One such case, Johnson v. Weedman, 5 Ill. (4 Scam.) 495 (1843), is of particular historical interest. In that case, plaintiff gave possession of his horse to defendant for pasturing and feeding. Without plaintiff's authority, defendant rode the horse for 15 miles. After returning the horse, it died within a few hours, but not because of the 15-mile ride. Plaintiff brought an action for trover, claiming conversion of the horse. The court held for the defendant, rejecting the doctrine that "any and every use by the bailee, not falling strictly within the terms of the bailment, is a conversion." *Id.* at 497. The case is historically interesting because the attorney for the defendant, who advanced the argument that under the facts there was no conversion, is listed in the case report as "A. Lincoln."

34. 410 F.2d 701, 707 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969).

that not every wrongful interference with the personal property of another is a conversion. Where the intermeddling falls short of the complete or very substantial deprivation of possessory rights in the property, the tort committed is not conversion, but the lesser wrong of trespass to chattels."[35] Since the Pentagon Papers were entrusted to Ellsberg for the entire time they were in his possession, the Government was not deprived of "possessory rights in the property" by Ellsberg's temporary removal of the Papers. Indeed, if there was no conversion in *Pearson*, a fortiori there was none in the Pentagon Papers case because in *Pearson* the persons removing the documents from Senator Dodd's office had no authority to enter the office or to have possession of the documents in question.

Thus, Ellsberg's temporary removal of the documents from Rand could not by itself constitute criminal conversion; it could at most result in civil liability for trespass to chattels. But did the copying of the Papers render his conduct "conversion"? That aspect of the case will now be examined.

2. *Reproduction of the papers.*

Statutory analysis. The right to prevent or control the making of copies of material contained in a document is known to the law as a "copyright."[36] It is an intangible property right, separate and distinct from any property right in the tangible document copied.[37] As one court has explained: "A copyright, when secured in accordance with applicable laws is the *right* to multiply copies of a literary, intellectual or artistic property. Nowhere in the constitutional or statutory scheme does the law create a right by copyright *in the property*. It is an incorporeal (intangible) right existing independently from the corporeal (tangible) property out of which it arises."[38] Thus, ownership of a tangible document does not give the owner the right to make copies thereof, or to prevent others from making copies; those rights are given to the owner of the copyright in the document.[39]

35. *Id.* at 706.

36. *See* 17 U.S.C. § 1 (1970); M. NIMMER, COPYRIGHT § 101 (1973).

37. 17 U.S.C. § 27 (1970).

38. Walt Disney Prods. v. United States, 327 F. Supp. 189, 192 (C.D. Cal. 1971) (emphasis by the court). In Michael Todd Co. v. County of Los Angeles, 57 Cal. 2d 684, 689, 371 P.2d 340, 342–43, 21 Cal. Rptr. 604, 606–07 (1962), the court stated that "plaintiff's copyright is intangible property wholly distinct from any property interest . . . in the material object copyrighted." The court went on to say that "the legal right to make copies of copyrighted material derives from the copyright statute alone and has never been deemed an attribute of the ownership of that material . . . ." *Id.* at 691–92, 371 P.2d at 344, 21 Cal. Rptr. at 608. *See also* Stevens v. Gladding, 58 U.S. (17 How.) 604, 607 (1854); Stephens v. Cady, 55 U.S. (14 How.) 318, 319 (1852); Snook v. Blank, 92 F. Supp. 518, 520 (D. Mont. 1948); Davenport Quigley Expedition, Inc. v. Century Prod., Inc., 18 F. Supp. 974, 977 (S.D.N.Y. 1937).

39. *See* Hampton v. Paramount Pictures Corp., 279 F.2d 100 (9th Cir. 1960) (owner of motion picture film print held not to have the right to exhibit such film in violation of plaintiff's copyright); National Geographic Soc'y v. Classified Geographic, Inc., 27 F. Supp. 655 (D. Mass. 1939). The distinction between ownership of a copyright and ownership of a tangible document in which the work appears can be seen by considering an ordinary book purchase. The buyer becomes the owner of the tangible property (the book), but not of the copyright in the book. If he reproduces the book he will be a copyright infringer even though he owns the copy from which the reproduction is made. But

Reproduction of a work may constitute copyright infringement if a copyright inheres in the work reproduced, but it does not constitute "conversion" of the document from which the work is reproduced; a number of cases affirm that the reproduction of documents, or of information contained therein, does not constitute conversion.[40]

But even if, contrary to the prevailing rule, a court were to conclude that unauthorized copying constitutes tortious conversion, Ellsberg's actions were not within the scope of section 641. This conclusion is reached when section 641 is construed together with the relevant provisions of the copyright law. First, Congress has provided in 17 U.S.C. § 8[41] that "[n]o copyright shall subsist in . . . any publication of the United States Government, or any reprint, in whole or in part, thereof . . . ." Thus, all federal government "publications" are in the public domain, and making copies of such documents does not constitute copyright infringement. It is arguable that a work is a "publication" if it has been published either by a general publication, or by a publication limited as to persons and purpose.[42] It appeared from the evidence at the Ellsberg trial that the documents allegedly converted had been distributed (and hence "published") to selected nongovernment personnel, including Rand personnel, subject to certain restrictions.

Moreover, even if "publications" ordinarily would not include works distributed to a limited group for a limited purpose,[43] the reference to "publication of the United States Government" in 17 U.S.C. § 8 should be interpreted to refer to all governmental documents, even those that have not technically been published. Otherwise, the section would probably constitute an unconstitutional abridgment of first amendment rights. Suppose, for example, that a presidential inaugural address were never dis-

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if he destroys his copy, the copyright owner may not assert "conversion" of the copyright owner's property, since that which was destroyed belonged to the book purchaser.

40. *See, e.g.*, Local Trademarks, Inc. v. Price, 170 F.2d 715 (5th Cir. 1948); Pickford Corp. v. De Luxe Laboratories, Inc., 169 F. Supp. 118 (S.D. Cal. 1958); Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 114 P.2d 370 (3d Dist. 1941); A.J. Sandy, Inc. v. Junior City, Inc., 17 App. Div. 2d 407, 234 N.Y.S.2d 508 (1st Dep't 1962); Schisgall v. Fairchild Publications, Inc., 207 Misc. 224, 137 N.Y.S.2d 312 (Sup. Ct. 1955); MacKay v. Benjamin Franklin Realty & Holding Co., 288 Pa. 207, 135 A. 613 (1927); *cf.* Chappell v. United States, 270 F.2d 274, 278 (9th Cir. 1959), a case involving § 641 in which the court approved the principle "that intangible property relations may not be converted." *But cf.* RESTATEMENT (SECOND) OF TORTS § 242(1) (1965) which suggests that with respect to a document "in which intangible rights are merged," damages for conversion of the document include the value of the intangible rights, although Comment *f* and the Reporter's Notes thereto which suggest that an "idea," even though reduced to tangible form, does not constitute a document in which an intangible right is merged.

41. 17 U.S.C. § 8 (1970).

42. *See* MacMillan Co. v. King, 223 F. 862 (D. Mass. 1914); M. NIMMER, *supra* note 36, §§ 58, 104.

43. A "limited publication" is said to occur when copies of a work are distributed to a selected or limited number of persons for a limited purpose (for example, their own personal use). *See* White v. Kimmell, 193 F.2d 744 (9th Cir.), *cert. denied*, 343 U.S. 957 (1952); M. NIMMER, *supra* note 36, § 58.

tributed in printed form by the Government. The delivery of the speech is not in itself a "publication";[44] hence the address would not constitute a "publication of the United States Government" if "publication" in this context required the formal act of publishing. Yet, in view of the first amendment the Government could hardly assert a right of literary property so as to preclude others from reproducing the address.[45] As the Register of Copyrights has said: "[C]ontrol over unauthorized dissemination of unpublished Government works should be dealt with as a matter of security rather than literary property."[46]

Congress has further provided that willfully infringing a copyrighted work for profit is a crime.[47] Reading this provision together with 17 U.S.C. § 8, it becomes clear as a matter of congressional intent that it shall not be a crime to copy published governmental documents. This is not to say that Congress could not in another enactment repeal or modify that rule with respect to certain kinds of copying: Congress has made some copying criminal in 18 U.S.C. § 793(b).[48] But can 18 U.S.C. § 641 be read as any such repeal or modification? The copyright laws announce to the public that it may copy governmental documents without incurring criminal liability. Section 641 does not purport to make a special rule for classified or "sensitive" or even unpublished documents. Its subject matter is "any record, voucher, money, or thing of value of the United States." Presumably any government document is a "thing of value of the United States." If copying such a "thing of value" is an act of criminal conversion, then the immunity from criminal liability provided by 17 U.S.C. § 8 is lost under the general language of section 641. Such a strained construction of section 641 would constitute a trap for those relying upon the congressional invitation to copy contained in 17 U.S.C. § 8. Surely the specific language of section 8 must control; thus, applying the canon that criminal statutes are to be narrowly construed, it follows that section 641 cannot include the copying of govern-

44. *See* King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963); M. NIMMER, *supra* note 36, § 53.

45. *See* Lee v. Runge, 404 U.S. 887, 892–93 (1971) (Douglas, J., dissenting); M. NIMMER, *supra* note 36, § 9.2; *cf.* Robert Stigwood Group Ltd. v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972).

46. HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 9 (1965).

47. 17 U.S.C. § 104 (1970).

48. "(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, [*i.e.*, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation] copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense . . .

. . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 18 U.S.C. § 793(b) (1970).

mental documents as part of its prohibition against conversion of "things of value of the United States."[49]

The constitutionality of prohibiting reproduction under section 641. The right to disseminate information regarding the activities of the federal government lies at the very core of the freedoms of speech and press protected by the first amendment.[50] If unauthorized reproduction of documents constitutes "conversion" under section 641, that section is clearly overbroad because then such reproduction of any governmental document could constitute an act of criminal conversion. Section 641 could thus be used as a vehicle for rendering criminal the reproduction of the most innocuous and the most significant types of governmental documents without reference to whether any such reproduction would be injurious to the national security or to any other legitimate governmental interest. Under this construction of the statute, it is not just classified documents, or even documents relating to the national defense, the reproduction of which may be rendered criminal, but any documents which a governmental official may, in his uncontrolled discretion, decide should not be reproduced.[51] Because the statute contains no standards for officials to use in deciding whether to permit reproduction of given governmental documents, this construction of section 641 renders it as violative of the first amendment as were the numerous parade ordinances struck down as overbroad by the Supreme Court because of the lack of standards to guide officials in granting parade permits.[52] Just as such standardless parade ordinances abridge freedom of speech, so too does section 641 if it is read as prohibiting the reproduction of governmental documents.

If the statute is constitutionally defective for overbreadth it may not be enforced even against one who committed an act which could constitutionally have been punished had the act been proscribed by a more narrowly drawn statute.[53] Therefore, even if the reproduction of the Pentagon

49. It is worth repeating that the position espoused here is not that by reason of the copyright law no other law *could* make copying certain government documents a crime—rather, that § 641 is not such a law. A law which in specific terms permits copying should be said to control a general, ambiguous criminal law which conceivably could be interpreted to prohibit copying, but does not do so in specific terms.

50. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

51. The Government argued that its classification procedures, Exec. Order No. 10,501, 3 C.F.R. 979 (1949–53 Comp.), *superseded by* Exec. Order No. 11,652, 3 C.F.R. 375 (1973), *see* note 102 *infra*, determined which documents could be reproduced. *See* Record at 13,354. Even assuming that these classification standards meet the demands of the first amendment (it is argued that they do not in notes 78–108 *infra* and accompanying text), § 641 is still overbroad because it does not by its terms limit the suppression of speech to the standards set forth in the Executive Order. *Cf.* note 90 *infra*.

52. *See* notes 93–96 *infra* and accompanying text; Cox v. Louisiana, 379 U.S. 536, 557 (1965): "This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will be not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor."

53. "Because of the sensitive nature of constitutionally protected expression we have not required

Papers could be a conversion under a narrowly drawn statute, Ellsberg could not be found guilty of conversion under section 641.

C. *Embezzlement*

To constitute the crime of embezzlement there must be a fraudulent conversion of property.[54] This generally accepted principle was applied to the crime of embezzlement under section 641 by a federal district court in *United States v. Powell*.[55] That court defined the necessary elements for embezzlement under section 641 as follows:

> (1) a trust or fiduciary relationship, (2) that the property claimed embezzled is embraced within the meaning of the statute, (3) that it came into the possession or care of the accused by virtue of his employment, (4) [that] it is property of another, (5) that his dealing therewith constituted a fraudulent conversion or appropriation of same to his own use, and (6) [that] such was with the intent to deprive the owner thereof.[56]

Since Ellsberg could not be held liable for conversion,[57] it follows that the fifth element is missing, so that he likewise could not be held liable for embezzlement. In addition, several other of the elements required for embezzlement are lacking. With respect to the tangible documents, there was no "intent to deprive the owner thereof."[58] Since the appropriation of the information contained in such documents through the act of copying similarly did not deprive the owner of the documents of such information,[59]

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that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser. . . . [W]e have consistently allowed attacks on overly broad statutes *with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity.*" Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (emphasis added); *cf.* Broadrick v. Oklahoma, 93 S. Ct. 2908, 2918 (1973): "[W]here conduct and not merely speech is involved . . . overbreadth . . . must be . . . substantial . . . ." This decision was anticipated in the dissenting opinion of Justice White (joined by Burger, C.J., and Blackmun, J.) in Coates v. City of Cincinnati, 402 U.S. 611, 620 (1971), which would limit the overbreadth doctrine to statutes "clearly reaching speech" and not to those which by their terms regulate conduct, even though they may be applied in such a manner as to abridge speech. If "conversion" is construed to include the reproduction and/or dissemination of information contained in government documents, then § 641 is a statute "clearly reaching speech." *See also* NAACP v. Button, 371 U.S. 415, 432–433 (1963); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

54. *E.g.*, United States v. Goldsmith, 274 F. Supp. 494, 495 (E.D. Pa. 1967).

55. 294 F. Supp. 1353 (E.D. Va. 1968), *aff'd*, 413 F.2d 1037 (4th Cir. 1969).

56. *Id.* at 1355.

57. *See* notes 29–53 *supra* and accompanying text.

58. *See* notes 20–23 *supra* and accompanying text.

59. *See* notes 26–27 *supra* and accompanying text. *But see* People v. Dolbeer, 214 Cal. App. 2d 619, 29 Cal. Rptr. 573 (1st Dist. 1963), in which the court sustained a conviction for conspiracy to commit embezzlement where the lists in question were carried off, photocopied, and then the originals returned and the copies retained, although an intent permanently to deprive the owner of the original documents was lacking. The court stated: "It may be that, had the operation in our case been merely the copying, transcribing or photographing of the lists, without any asportation, prosecution would not lie, because nothing tangible had been purloined, for stealing of telephone information only has not been made a specific crime, as has stealing of title company data, irrespective of asportation (Pen. Code, § 496c). Here, there was not merely a taking of information such as might have been heard or seen, but an asportation of tangibles." *Id.* at 623, 29 Cal. Rptr. at 575. The "asportation of tangibles" by Ellsberg was, as we have seen, of an insignificant nature. *See* notes 29–35 *supra* and accompanying text.

element six was not present. Moreover, as set forth more fully above,[60] it seems clear from 17 U.S.C. § 8 that reproduction of governmental documents cannot be regarded as the violation of a *property* right; hence, elements two and four are not present.

IV. The Unconstitutionality of 18 U.S.C. §§ 793 (d)–(e)

A. *Subsections 793(d) and (e) Cannot Be Narrowly Construed*

Congress has rendered unlawful, in 18 U.S.C. §§ 793(d)–(e),[61] certain dispositions, such as communication, delivery, and transmission, of

> any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . . .

The counts of the indictment against Ellsberg alleging violations of these subsections dealt only with "documents," not with any of the other enumerated items. Most crucially, the indictment did not allege unlawful disposition of "information."

It is clear from the statute that while dispositions of "information relating to the national defense" are proscribed only with respect to such "information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," no such clause qualifies dispositions of "any document." The words of the statute thus render unlawful dispositions of any document relating to the national defense without requiring reason to believe that such document could be used to the injury of the United States or to the advantage of any foreign nation. This is evident not only from the statute itself, but also from the expressed legislative intent. The report of the Senate Judiciary Committee, which formulated and approved the particular statutory language relating to "information," explained that the phrase " 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection."[62]

This interpretation of the statute would explain why the indictment failed to allege any possibility or likelihood of injury to the United States or advantage to any foreign nation: the Government naturally wished to

60. *See* notes 36–49 *supra* and accompanying text.

61. 18 U.S.C. §§ 793(d)–(e) (1970). Subsections (d) and (e) are set out in note 17 *supra*.

62. S. Rep. No. 2369, 81st Cong., 2d Sess., pt. 1, at 9 (1950), *quoted in* New York Times Co. v. United States, 403 U.S. 713, 738 n.9 (1971) (White, J., concurring); *cf.* the rather ambiguous House report, H.R. Rep. No. 647, 81st Cong., 1st Sess. 3 (1949).

avoid the burden of proving "injury" to the United States. In an attempt to impose this burden upon the Government, the defendants argued that a specific intent to injure the United States or aid a foreign nation was impliedly required.[63] On this issue, it seems to me that the Government was correct, but with consequences to which the Government, no doubt, would not accede. Ironically, the Government's interpretation would render subsections (d) and (e) manifestly unconstitutional.

It will be shown below that failure to require an intent to injure the United States or aid a foreign nation makes the provision relating to disposition of documents fatally overbroad.[64] But can such overbreadth be avoided by a narrow judicial construction? It was presumably with this intent that Judge Byrne tentatively ruled that "the documents [must be] the type that require protection in the interest of the national defense, in that their disclosure could adversely affect or injure this nation or be to the advantage of any foreign nation."[65] However, such a judicial construction is unacceptable for several reasons. First, it does violence to the stated congressional intent.[66] Second, the phrase "document . . . relating to the national defense" does not necessarily or even reasonably imply that the document must be one that could be used to the injury of the United States. If this were implied by the words "relating to the national defense" with respect to documents, then it would have been unnecessary with respect to "information relating to the national defense" to add the qualification "which information the possessor has reason to believe could be used to the injury of the United States."[67] *Expressio unius est exclusio alterius.* Moreover, in *Gorin v. United States*,[68] the United States Supreme Court noted in construing another portion of this statute, that if the phrase "relating to the national defense" were used without any qualification, the statutory provision might be void for vagueness. The Court concluded that the statute was saved from such invalidity only because of "the obvious delimiting words in the statute . . . requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' "[69] Thus the Court determined that the words "relating to the national defense" do not in and of themselves carry the meaning of injury to the United States.

Given the clear statutory language, the statement of legislative intent,

63. Defendants' Memorandum in Support of Motion to Dismiss at 30, United States v. Russo, No. 9373-(WMB)-CD (filed Dec. 29, 1971), *dismissed* (C.D. Cal. May 11, 1973).

64. *See* notes 73-77 *infra* and accompanying text.

65. Record at 8,219-20.

66. *See* note 62 *supra* and accompanying text.

67. Gorin v. United States, 312 U.S. 19, 26 (1941).

68. *Id.*, *construing* the Espionage Act of 1917, ch. 30, §§ 1(b)-2(a), 40 Stat. 217-19. Section 1(b) was the precursor of 18 U.S.C. § 793(b) (1970), while *id.* §§ 793(d)-(e) are based in part upon § 2(a).

69. 312 U.S. at 27-28.

and the prior construction of this language by the Supreme Court, it seems clear that a trial court could not narrowly construe the statute in order to save it from constitutional invalidity without in effect rewriting it. Faced with this issue in *United States v. Robel*,[70] the Supreme Court said: "We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation which will stay within those bounds has been committed to Congress." In holding a federal statute invalid for overbreadth, the Court relied upon its earlier statement in *Aptheker v. Secretary of State*[71] that "[t]he clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting."[72] Because subsections (d) and (e) are similarly clear and precise, they may not be rewritten to save them from constitutional invalidity.

B. *Subsections 793(d) and (e) Are Facially Overbroad*

Subsections (d) and (e) prohibit the exercise of the right of freedom of speech in circumstances where no compelling government interest exists. What is a "document . . . relating to national defense"?[73] The Supreme Court has stated that "national defense" is "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."[74] There are innumerable documents referring to the military or naval establishments, or related activities of national preparedness, which threaten no conceivable security or other government interest that would justify punishing one who "communicates" such documents. If an issue of the *Congressional Record* should contain a table of the salary scales of army personnel, or a presidential speech dealing

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70. 389 U.S. 258, 267 (1967).

71. 378 U.S. 500 (1964).

72. *Id.* at 515. The Court further stated in *Aptheker*: "It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it." *Id.*, *quoting* Scales v. United States, 367 U.S. 203, 211 (1961).

73. In the debate prior to enactment of the original Espionage Act of 1917, ch. 30, 40 Stat. 217, many legislators objected to the vagueness and breadth of the term "national defense." Thus Senator Cummins: "Now, I do not know, as I have said a great many times, what does relate to the public defense, and no human being can define it. Nobody has attempted to define it in this debate; and I repeat that I assume that it embraces everything which goes to make up a successful national life in the Republic. It begins with the farm and the forest, and it ends with the Army and the Navy. Now, I am unwilling to give the President, even in time of war, the right to lay an embargo upon information concerning these subjects. I think it unwise, and it is a power that might easily be abused." 54 CONG. REC. 3606 (1917). As a result of the objections of Senator Cummins and others, the qualification was added requiring an "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . . ." *See also* Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 974 (1973), in which the authors conclude that the phrase "relating to the national defense" was adopted "without principled limitations in the minds of the Congresses which adopted it."

74. Gorin v. United States, 312 U.S. 19, 28 (1941).

with American military activities in Vietnam is published, surely further communication of these "documents relating to the national defense" cannot be rendered criminal because the Government has decided that the public is no longer "entitled" to receive them.[75]

Moreover, the coverage of neither of these subsections is limited to "documents," etc., which are the property of the Government of the United States. Thus, a newspaper article dealing with questions of national defense could be considered a "document relating to national defense." In these and other examples that could be cited, it is clear that the statute, if applied according to its terms, would result in an unconstitutional abridgment of first amendment freedoms. Although *Gorin v. United States*[76] decided the issue of vagueness, and not the issue of overbreadth, the sections of the Espionage Act there in issue were arguably saved from invalidity for vagueness *and* overbreadth only by the qualifying phrase "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." Since such a qualifying phrase regarding documents is not present in subsections 793(d) and (e), those subsections are overbroad, and thus invalid under the first amendment.[77]

V. Toward a Constitutional Standard Definitionally Balancing National Security Secrecy and Free Speech

A. *The Need for a Standard*

Underlying the Pentagon Papers case was a largely unexplored issue of constitutional law: To what extent does the governmental interest in na-

75. An additional example of documents "relating to the national defense" that the Government has no legitimate interest in protecting from the public is provided by the leases of private businesses operating in the Pentagon building itself. In 1958 a House committee reported: "Some 20 private firms, including a department store, drugstore, and bank, occupy space on the concourse in the Pentagon to do business with the 30,000 virtual [*sic*] 'captive' consumers employed there. The selected firms pay a percentage of their receipts to the Government as rent. Until the subcommittee made an issue of it because of complaints from the press, the Defense Department negotiated the leases in secret and kept the terms of the leases secret." H.R. Rep. No. 1884, 85th Cong., 2d Sess. 6 (1958).

76. 312 U.S. 19 (1941); *see* notes 67–69 *supra* and accompanying text.

77. Because of this overbreadth, the statute is unconstitutional and cannot be applied even against persons whose activities might have legitimately been regulated by a narrowly drawn statute. *See* note 53 *supra* and accompanying text.

Several counts of the Ellsberg indictment also alleged violation of 18 U.S.C. § 793(c) (1970) in that the defendants knew and had reason to believe that the documents would be used in such a manner as to violate subsections 793(d) and (e). Subsection (c) provides criminal penalties for anyone who, "for the purpose aforesaid, [*i.e.*, for the purpose of obtaining information respecting the national defense] receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter. . . ." Since subsections (d) and (e) could not themselves be violated, it must follow that likewise no violation was alleged in the § 793(c) counts.

tional security justify the suppression of speech relating to national security matters? This is a large and complex topic; this Article, therefore, only attempts to indicate the dimensions of the problem and to outline a proposed solution.

Two polar positions are possible on this issue. First, it might be contended that the first amendment makes the Government powerless to punish any disclosure of any secrets, since such disclosure constitutes protected "speech." This position may be rejected as going to an untenable, if not ridiculous, extreme.[78] But one must likewise reject the other polar position, which would contend that any time a government official causes the stamp of "secret" to be placed upon a document, all first amendment inquiry is ended, and that the courts are powerless to go beyond such legislative or administrative action. The Supreme Court has emphasized:

> Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.[79]

The same is true of "national security" and "government secrecy"—the mere label does not foreclose a first amendment inquiry.

But if we reject both extreme positions, what alternatives remain? If some speech concerning national security matters is to qualify for first amendment protection, but if all such speech should not so qualify, then courts must establish a standard to distinguish the former from the latter.[80]

78. Very few of even those who profess to take this "absolutist" position would adhere to it without qualification. For example, few, if any, would hold to the view that the first amendment invalidates laws prohibiting perjury, agreements in restraint of trade, or fraudulent statements, although all of these laws to some degree abridge speech. Furthermore, Justice Black, the recognized leader of the absolutist position, sometimes failed to recognize first amendment protection even for speech which many others (including nonabsolutists) thought clearly protected. *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971), in which Justice Black joined in Justice Blackmun's dissenting opinion, taking the position that the phrase "Fuck the Draft" constituted fighting words under the doctrine of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and hence should be denied first amendment protection. For a general discussion of the inadequacy of the absolutist position, *see* Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

79. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (footnotes omitted). *See also* NAACP v. Button, 371 U.S. 415, 429 (1963): "[A] State cannot foreclose the exercise of constitutional rights by mere labels."

80. The need for such a standard was stressed by Justice Blackmun in his dissenting opinion in New York Times Co. v. United States, 403 U.S. 713, 761 (1971): "What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and the very narrow right of the Government to prevent. Such standards are not yet developed."

This call for the development of constitutionally acceptable standards assumes that the issue is justiciable. If the standards to be developed are sufficiently concrete and narrow, no reason exists why the application of such standards should be nonjusticiable. The issues presented are not inherently less susceptible of judicial determination than are reapportionment questions. *See* Baker v. Carr, 369 U.S. 186 (1962). Nor are they inherently more complex than, for example, economic issues in antitrust litigation. Still, there are a number of decisions which limit the scope of judicial inquiry into the question of whether secrecy is required in the national interest. These limitations, however, in each instance flow from the nature of the statutory context, not from inherent judicial limitations in deter-

This is precisely what the Supreme Court did in the area of libel in *New York Times Co. v. Sullivan* and its progeny.[81] In these cases, the Supreme Court determined that some libelous speech was outside the ambit of first amendment protection,[82] but that all other libelous speech, at least if made with reference to public officials,[83] public figures,[84] or matters of public interest,[85] would command first amendment protection. This process has been called "definitional balancing" because a court is called upon to define "speech" within the meaning of the first amendment by balancing the speech and the antispeech interests[86] involved in a given area of law. This is to be distinguished from "ad hoc balancing," by which courts have sometimes simply attempted to balance the respective interests of the litigants, rather than reaching a balance based upon the broader societal interests presented when antispeech interests collide with speech interests.[87]

Whatever may be the correct standard, it is clear that if no standard at all is applied by the Government—if the determination of government secrecy is made by executive fiat based upon no principled ground—then such determination cannot pass constitutional muster. The Supreme Court in *Staub v. Baxley*[88] observed:

> It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.[89]

mining the extent of first amendment rights. *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970); Scarbeck v. United States, 317 F.2d 546 (D.C. Cir. 1962). Concerning the justiciability of classification issues under the first amendment, *see* United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (nonjusticiable).

81. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); *see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (most recent decision).

82. Speech made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

83. *Id.* at 279.

84. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

85. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971) (Brennan, J., plurality opinion): "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved . . . ."

86. Such antispeech interests include, for example, interests in reputation, privacy, and maintaining public order. For the distinction between a state interest which is antispeech and one which is nonspeech, see Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. Rev. 29 (1973).

87. For a fuller discussion of the distinction between definitional and ad hoc balancing, and the manner in which definitional balancing has been used in the areas of libel and right of privacy, *see* Nimmer, *supra* note 78. For the use of definitional balancing in the copyright area, see Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A.L. Rev. 1180 (1970). For earlier formulations of the doctrine of definitional balancing, see C. Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, in The Occasions of Justice 89 (1963); Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 916–18 (1963); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962).

88. 355 U.S. 313, 322 (1958). *See also* Coates v. City of Cincinnati, 402 U.S. 611 (1971).

89. After quoting this passage from *Staub*, the Court in Shuttlesworth v. City of Birmingham,

At the Pentagon Papers trial, the Government introduced no evidence whatsoever indicating the criteria applied in classifying the documents in issue. The Government therefore failed to meet its constitutional burden of proving that the determination to withhold authority to disclose or to reproduce the documents so as to trigger violation of sections 641 and 793 was based upon permissible standards.[90]

B. *Use of "to the Injury of the United States or to the Advantage of a Foreign Nation" as a Standard*

It was assumed above[91] that if the phrase "to the injury of the United States or to the advantage of a foreign nation" qualified the proscribed dispositions of "any document" in subsections 793(d) and (e), the statute would be saved from invalidity for overbreadth. It is now time to reassess that premise. Even if the Government had applied this standard in determining whether a given document should be classified "secret," this standard would not satisfy the first amendment.

An initial drawback of the proposed standard is that it is stated in the disjunctive: "to the injury of the United States" *or* "to the advantage of a foreign nation." The dissemination of a document may be prohibited even if such dissemination would not be to the injury of the United States, provided only that such dissemination would be to the advantage of a foreign nation. But if a communication does not work an injury to the United States, it would seem to follow logically that no government interest can be asserted to overcome the first amendment's guarantee of freedom of speech.[92]

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394 U.S. 147, 151 (1969), concluded that "a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."

90. Even if, as the Government argued, the standards for classification set forth in Exec. Order No. 10,501, 3 C.F.R. 979 (1949–53 Comp.), had been observed in classifying the Pentagon Papers, and even if such classification standards satisfied first amendment requirements, subsections 793(d) and (e) would still be defectively overbroad because the executive's power to suppress communicative activities is not limited by the statute to those occasions when such classification standards are met. *Cf.* note 51 *supra*.

91. *See* notes 64–72 *supra* and accompanying text.

92. As originally passed by the House of Representatives, the "advantage" alternative was not included in the statutory formulation. Edgar & Schmidt, *supra* note 73, at 988; *cf.* 40 Op. Att'y Gen. 247, 250 (1942) (defense contractors' communication of defense information to Lend-Lease Allies said not to violate the Espionage Act because "the primary advantage sought is that of the United States itself; the conferring of an advantage upon an allied nation is but a means to that end"). But what if the communication, while an aid to a foreign nation, creates neither an advantage nor disadvantage to the United States? Judge Learned Hand in United States v. Heine, 151 F.2d 813 (2d Cir. 1945), further construed the clause not to be applicable to information of "advantage" to a foreign government if such information had theretofore been made public within the United States. But may the disclosure of "secret" information be punished under first amendment standards where, by hypothesis, the United States has no interest in maintaining such secrecy? *See* Gorin v. United States, 312 U.S. 19, 30 (1941): "Unhappily the status of a foreign government may change. The evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain."

Also objectionable is the general standard of "injury" to the United States. Since such a standard would never be acceptable in other speech contexts, there is no reason that it should be more acceptable where the antispeech interest is national security. For example, in *Shuttlesworth v. Birmingham*,[93] the Court invalidated a parade ordinance which authorized the withholding of permits if, in the City Commission's judgment, "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused."[94] The Court found that this constituted "virtually unbridled and absolute power to prohibit any 'parade,' "[95] and concluded that there must be "narrow, objective, and definite standards to guide the licensing authority."[96] The various terms rejected in *Shuttlesworth*, such as "public welfare," "peace," "safety," and so on, are all relatively specific applications of the general concept of protection against "injury." If these terms are too vague to be meaningful, this is undoubtedly true also of the abstract standard of "injury."

C. *On the Nature of a Constitutionally Acceptable Standard*

The Pentagon Papers court was not called upon to formulate such a constitutional standard. If the merits of the case had been reached, the court should have been required to decide only whether the Government had met its burden in the formulation and application of such a standard sufficiently to justify the punishment of Ellsberg for his specific activities. As stated above, the Government failed to meet this burden.[97] Still, some concluding observations may be in order as to the nature of an acceptable definitional balance in this area.

Where communicative activities occur with the intent to achieve a public disclosure to the American people (as distinguished from a private disclosure to an agent of a foreign nation[98]), then it seems proper to conclude that such activities may be the subject of criminal punishment[99] only if a

93. 394 U.S. 147 (1969).
94. *Id.* at 149–50.
95. *Id.* at 150.
96. *Id.* at 151. The Court indicated that it would be acceptable to base the decision to grant a permit upon whether "the convenience of the public in the use of the streets [or sidewalks] would . . . thereby be unduly disturbed . . . ." *Id.* at 156.
97. *See* note 90 *supra* and accompanying text.
98. *See* United States v. Rosenberg, 195 F.2d 583, 591–92 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1953).
99. This is to be distinguished from grounds for discharge, where, as Justice Marshall's concurrence in New York Times Co. v. United States, 403 U.S. 713, 741 (1971), suggests, a less severe constitutional standard may be applied. Notwithstanding the doctrine of unconstitutional conditions, *see* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), a distinction must be drawn between first amendment rights with respect to employment and with respect to criminal punishment. A high school teacher employed to teach English who insists instead upon teaching history may be discharged for insubordination even though his history "speech" is protected from criminal punishment under the first amendment. Similarly, a government employee instructed not to disclose publicly certain information may not (assuming such information falls on the free speech side of the definitional balance) be criminally punished for making

"serious injury" to the state[100] can be proven to be both likely and imminent as a result of such public disclosure, as the Supreme Court has required in other free speech contexts.[101] The definition of "top secret" as contained in Executive Order No. 10,501,[102] under which the Pentagon Papers were classified, while limiting the classification to "that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation," is unacceptable as a constitutional standard if for no other reason than that it completely ignores the elements of likelihood and imminence. After the indictment against Ellsberg, and partly to correct this defect,[103] President Nixon replaced Executive Order No. 10,501 with Executive Order No. 11,652.[104] This, however, only replaced the words "could result" in the earlier order with the words "could reasonably be expected to cause," a constitutionally insignificant change.[105]

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such a disclosure, but he may nevertheless be discharged for insubordination. Of course, if the employee's speech activities do not bear upon the performance of the services for which he was employed, then under the first amendment he may not be discharged for such speech any more than he may be criminally punished therefor. *See* Perry v. Sindermann, 408 U.S. 593 (1972). On the other hand, if the speech activities fall on the national security side of the definitional balance, then such speech activities may constitute grounds for criminal punishment as well as (if the speech is employment-related) discharge. *Cf.* United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (civil action against former employee to enforce secrecy agreement).

100. *Cf.* Justice Brandeis' formulation of the "clear and present danger" test in Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion).

101. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969), for a relatively recent articulation by the Supreme Court of the necessity that these elements be present before speech may be suppressed.

102. "(a) Top Secret. Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret Classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense." 3 C.F.R. 979 (1949–53 Comp.), *superseded by* Exec. Order No. 11,652, 3 C.F.R. 375 (1973).

103. "We have also attempted, in the definition of the material that should be classified 'Top Secret,' 'Secret' and 'Confidential,' to put a constraint on the information that is so classified by requiring that if it were disclosed there must be a reasonable connection between disclosure and damage. The old Executive Order provided that any damage was a ground, and it did not matter, really, how remote it was. So if someone could dream up an odd set or wild set of circumstances under which they thought there would be damage, they could classify the material on that basis. Parenthetically, as a lawyer, I must say that the law would normally, you would say, imply a reasonable test anyway." Statement by David Young, Special Assistant to the National Security Council upon announcement of Executive Order No. 11,652, White House Press Release, Mar. 8, 1972.

104. "(A) 'Top Secret.' 'Top Secret' refers to that national security information or material which requires the highest degree of protection. The test for assigning 'Top Secret' classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of 'exceptionally grave damage' include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint." 3 C.F.R. 375, 376 (1973).

105. In addition to the elements of gravity, likelihood, and imminence of evil, some thought might be given to defining in very concrete terms the kinds of information which may be the subject of national security secrets, the disclosure of which could be punished. This may be an impossible undertaking, given the complexity of the issues involved. Still, it is worthwhile to make at least ten-

Closer to the mark appears to be Justice Brennan's suggestion that "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . ."[106] Also more acceptable would be the requirement that such disclosure "would place a person in immediate jeopardy."[107] When a "secret" is publicly disclosed, the Government is aware of such disclosure and ordinarily will have an opportunity to avoid any injury that may result from such disclosure. "If there be time . . . to avert the evil . . . the remedy to be applied is . . . not enforced silence."[108] To be sure, *some* injury would result from such a standard, but the harm is more than counterbalanced by the speech values enhanced. Along with some minimal injury to national interests, speech immunity in this context is likely to carry with it a healthy criticism of government officials whose activities could not otherwise be held up to the public light.

VI. Conclusion

The Pentagon Papers case (to say nothing of the more recent Watergate affair) vividly illustrates the manner in which vital criticism of public officials may be muted under the banner of national security. As early as 1822, Edward Livingston, a former Secretary of State, observed: "No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured."[109]

tative efforts in this direction. In this way we may hope to avoid a curtailment of first amendment rights by reason of popular pressure against unpopular defendants resulting in findings by courts and juries of gravity, likelihood, and imminence of evil when an objective, disinterested determination would hold otherwise. It is much more difficult for such popular pressures to transmute one kind of information into another. The determination of whether a discrete enumeration of kinds of information which may be the subject of national security secrets is feasible, and if so, just what should be included in any such enumeration lies beyond the scope of this Article, and beyond the competence of lawyers and law professors without the guidance of those expert in national defense matters. Those who wish to think this matter out further are referred to the suggestive (but, I believe) imperfect enumerations contained in the following sources: Office of Censorship, Code of Wartime Practices for the American Press (1942); Exec. Order No. 11,652, §§ 5(B)(1)–(4), 3 C.F.R. 375, 380–81 (1973); 32 C.F.R. § 1801.7 (1943). *See also* S. 2965, 92d Cong., 1st Sess. § 204(c) (1971).

106. New York Times Co. v. United States, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring). Justice Brennan suggests this standard in the context of prior restraints upon publication. *See also* Justice Stewart's concurrence in the same case in which he suggests that there cannot be prior restraints upon the press unless disclosure would "surely result in direct, immediate, and irreparable damage" to the nation. *Id.* at 730.

107. *See* Exec. Order No. 11,652, § 5(B)(4), 3 C.F.R. 375, 381 (1973).

108. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

109. 1 E. Livingston, Criminal Jurisprudence 15 (1873 ed.).